88-1377

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
JOHN F. CORDES
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

49p

QUESTION PRESENTED

Whether Social Security disability regulations that base the determination whether a child is disabled exclusively on medical factors without also considering vocational factors used for adults are inconsistent with 42 U.S.C. 1382c(a)(3)(A), which provides that a child under the age of 18 shall be considered disabled if he suffers from "any medically determinable physical or mental impairment of comparable severity" to one that would entitle an adult to benefits.

PARTIES TO THE PROCEEDING

Petitioner is the Acting Secretary of Health and Human Services. The respondents are plaintiff Brian Zebley and intervenors Evelyn Raushi and Joseph Love, Jr., representing a class, certified by the district court, of "[a]ll persons who are now, or who in the future will be, entitled to an administrative determination (whether initially, on reconsideration or on reopening) as to whether supplemental security income benefits are payable on account of a child who is disabled" (App., *infra*, 6a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Acting Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 855 F.2d 67. The memorandum and order of the district court (App., *infra*, 21a-24a) are reported at 642 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1988. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 18, 1988. App., *infra*, 25a. On January 9, 1989, Justice Brennan extended the time for filing a petition for a writ of certiorari

to and including February 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C.1382c(a)(3)(A) provides in pertinent part:

> An individual shall be considered to be disabled * * * if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

42 U.S.C. 1382c(a)(3)(B) provides in pertinent part:

> For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *.

20 C.F.R. 416.924 provides:

> We will find that a child under age 18 is disabled if he or she—
>
> (a) Is not doing any substantial gainful activity; and
>
> (b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)—

> (1) Meets the duration requirement; and
>
> (2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or
>
> (3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of this chapter.

STATEMENT

1. Supplemental Security Income (SSI) is available to certain persons who are "disabled." An adult is disabled if he or she "is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. 1382c(a)(3)(A). A child under 18 is disabled "if he suffers from any medically determinable physical or mental impairment *of comparable severity.*" *Ibid.* (emphasis added).

The Secretary has developed a five-part test to determine whether an adult filing a claim for benefits is disabled.[1] This test gives an adult three basic ways to show

---

[1] The five-step evaluation is set forth at 20 C.F.R. 416.920. See *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987). Step one determines whether the claimant is engaged in "substantial gainful activity." If so, benefits are denied. If the claimant is not engaged in such activity, the decisionmaker goes to step two, which asks whether the claimant's impairment or combination of impairments is "severe." If not, benefits are denied. Step three requires a determination whether the impairment is the same as or equivalent to a listed impairment. If so, the claimant is presumed disabled. At step four, the inquiry is whether the impairment prevents the claimant from doing his relevant past work. If the claimant cannot perform his relevant past work, the evaluation proceeds to step five, which decides whether the claimant can perform other work in the national economy in light of his age, education and work experience.

disability. First, if the claimant can show that he suffers from one of the "listed impairments" set forth in the regulations, with associated clinical symptoms and a specified degree of severity, he is presumed disabled. 20 C.F.R. 415.920(d), 416.925.[2] Second, a claimant who can show the "medical equivalent" of a listed impairment also benefits from a presumption of disability. 20 C.F.R. 416.920(d), 416.926. Finally, if the claimant has neither a listed impairment nor its medical equivalent, the Secretary will examine his "residual functional capacity" to determine if the claimant can perform his relevant past work or—given the claimant's age, education and work experience—whether he can perform other work in the national economy. 20 C.F.R. 416.920(e) & (f), 416.945.

Children are evaluated on a slightly different standard. Like adults, children must not be engaged in substantial gainful activity and must suffer from an impairment likely to last at least 12 consecutive months. 20 C.F.R. 416.924. In addition, a child is presumed disabled if he suffers from one of the listed impairments used for adults, to the extent that "the disease processes have a similar effect on adults and younger persons." 20 C.F.R. 416.924(b)(2), 416.925(b). Children can also show the medical equivalent of one of the listed impairments. 20 C.F.R. 416.924(b)(2); 416.925(b). Unlike adults, however, children are not evaluated on the basis of their capacity to perform prior work or substantial gainful employment in the national economy. Instead, children are covered by an additional list of impairments beyond that provided for adults and may establish the existence of one of these impairments or its medical equivalent. Thus, the regulations provide a

[2] The listed impairments appear in Appendix 1 to 20 C.F.R. Part 404, subpart P.

two-part list of impairments. Part A applies to adults and children alike, while Part B applies to children under 18 alone. 20 C.F.R. 416.925(b).

2. Brian Zebley suffers from congenital brain damage with spastic right hemiparesis, mental retardation, developmental delay, eye problems and musculoskeletal impairments on the right side (App., *infra*, 5a). He received SSI disability benefits from age two for a little over 28 months. In 1982, his benefits were terminated on the grounds that the then-current medical evidence demonstrated that he "no longer met or equaled the requirements of any section of the Listing of Impairments at Appendix 1" (*ibid.*). When administrative review failed to revive his benefits, Zebley initiated this combined individual/class action suit in the district court. On his own behalf, Zebley alleged that his benefits had been terminated without substantial evidence. Zebley also claimed, on behalf of the class, that "the Secretary's policy and regulations violated * * * 42 U.S.C. 1382c(a)(3)(A)" because the Secretary refused "to consider all pertinent facts and medical and vocational factors in determining children's eligibility for SSI disability payments" (App., *infra*, 6a). In January, 1984, the district court certified a class consisting of "[a]ll persons who are now, or who in the future will be, entitled to an administrative determination (whether initially, on reconsideration, or on reopening) as to whether supplemental security income benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed" (App., *infra*, 6a).

The district court granted Zebley's motion for partial summary judgment on his individual claim and remanded to the Secretary for calculation and award of benefits (App., *infra*, 6a). The district court also remanded the in-

dividual claims of two named intervenors to the Secretary for further review (*ibid.*). The district court then granted the Secretary's motion for partial summary judgment and dismissed the claims of the plaintiff class challenging the regulations. Relying principally on decisions from the First and Eleventh Circuits rejecting similar challenges to the same regulations, *Hinckley* v. *Secretary of Health & Human Services*, 742 F.2d 19 (1st Cir. 1984); *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982), the district court concluded (App., *infra*, 24a) that "the Secretary's listings of impairments • • • [are] not facially invalid or incomplete, seems to provide the necessary flexibility, and, in my view, permits the award of benefits in conformity with the intent of Congress." "If these criteria are being misapplied or misinterpreted," the court noted (*ibid.*), "the remedy lies in the appeal process in individual cases, not in a class-action decree."

3. The Secretary did not appeal from that portion of the judgement disposing of the individual claims of Zebley and the named intervenors. Plaintiff appealed, however, from the judgement upholding the Secretary's regulations, and the court of appeals reversed and remanded the case to the district court, with directions to enter summary judgment in favor of the plaintiff class. The court stated (App., *infra*, 11a) that Congress "expressed unambiguously its intent that 'any' impairment which meets the statutory standard shall be found disabling." The court noted that children are limited to establishing a presumption of disability under the listed impairments, while the adult standard provides for "individualized assessment of the *actual* degree of functional impairment of adults whose medical findings do not entitle them to a *presumption* of disability by meeting or equaling the listings." App., *infra*, 12a (emphasis in original). Because the listed impairments had not been shown to be an exhaustive compilation of medical conditions that could satisfy the

statute, the court held that the standard used for children violates the "clearly expressed" intent of Congress "that children be given the opportunity for individual evaluations comparable to the residual functional capacity assessment for adults" (App., *infra*, 17a).

The court of appeals acknowledged (App., *infra*, 16a) that its decision "places us in the minority among courts which have considered the legality of these regulations." The court, however, found the decisions of these other courts unconvincing. Specifically, the court rejected (App., *infra*, 12a) the Eleventh Circuit's conclusion in *Powell*, 688 F.2d at 1360, that the listing of children's impairments in Part B established criteria sufficiently "comparable to vocational factors for adults" to satisfy Congress's "comparable severity" requirement. The court below concluded (App., *infra*, 13a) that not all impairments of "comparable severity" would be identified by the listings for children and that this shortfall was contrary to Congress's expressed intention that " 'any' impairment which meets the statutory standard shall be found disabling." The court also rejected (App., *infra*, 13a) the First Circuit's conclusion in *Hinckley*, 742 F.2d at 23, that the Secretary's regulation "allows for an assessment of a child's mental or physical limitations on an individual basis by providing that a child may be found disabled if his impairment 'is determined by [the Secretary] to be medically equal to an impairment listed in [the Appendix].' " The court below noted (App., *infra*, 13a) that medical equivalence to a listed impairment was based only on medical findings whereas "it is functional impairment which is meant to be evidenced by the medical findings." An individualized determination of functional impairment is therefore "necessary in order to determine whether the degree of a claimant's impairment satisfies the statutory standard for disability" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Congress has not specified how the Secretary is to determine whether a child has a disability of "comparable severity" to one that would entitle an adult to receive disability benefits. The circumstances of adults and children applying for disability benefits are obviously different, since it makes no sense to measure the ability of a two-year-old child to perform substantial gainful employment in the national economy. It is clear that Congress did not intend to mandate such an inquiry, but instead directed the Secretary to determine the best way to correlate children's disabilities with adult disabilities, taking into account the obvious differences between the two categories of claimants. The court of appeals has struck down a reasonable attempt by the Secretary to do just that. In the process, it has placed itself in direct conflict with two other courts of appeals that have upheld the regulations in question. Furthermore, since the district court certified a nationwide class of "all people who are now, or who will be" entitled to children's SSI benefits, the court of appeals has apparently taken upon itself to overrule those two circuits and to preempt other circuits in which the issue is currently pending. The result will be a substantial disruption of the SSI program, requiring readjudication of hundreds of thousands of cases in accordance with a yet unformulated and, it would appear, highly speculative standard.

1. The court of appeals stated (App., *infra*, 11a) that "Congress has expressed unambiguously its intent that 'any' impairment which meets the statutory standard shall be found disabling." That is true; but it begs the question at issue: What is the statutory standard applicable to children? Congress did not say when it first extended the disability program to children in 1972. See Social Security

Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1471. The crucial term, "comparable severity," is left undefined in the statute. Congress itself recognized this fact, and subsequently charged the Secretary with the responsibility to "publish criteria to be employed to determine disability (as defined in [42 U.S.C. 1382c(a)(3)(A)] of the Social Security Act) in the case of persons who have not attained the age of 18." Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 501(b), 90 Stat. 2685. The Secretary has done so in a reasonable manner, and his regulations should have been upheld.

a. Congress has provided that an otherwise eligible adult is entitled to disability benefits "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" (42 U.S.C. 1382c(a)(3)(A)). Congress did not apply this same test to children for the obvious reason that most children, by simple reason of their age, are already unable to engage in "any substantial gainful activity." For an otherwise eligible child under 18, Congress provided instead that he is eligible for benefits "if he suffers from any medically determinable physical or mental impairment of comparable severity" to an impairment that would entitle an adult to benefits. But Congress nowhere defined "comparable severity." 42 U.S.C. 1382c(a)(3)(A) With respect to an adult, Congress quite clearly mandated an inquiry into whether "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which

exists in the national economy" (42 U.S.C. 1382c(a)(3)(B)). But Congress recognized, and the House Report accompanying this provision explicitly noted, that such an inquiry could not be applied to children:

> [a]n individual (*other than a child under age 18*), would be found disabled if his impairments are so severe that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work * * *.

H.R. Rep. No. 231, 92d Cong., 1st Sess. 148 (1971) (emphasis added).

Congress thus left to the Secretary the task of formulating criteria for measuring children's disabilities pursuant to the Secretary's general authority to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits" in disability cases. 42 U.S.C. 405(a), 1383(d)(1). See *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987), slip op. 6-7; *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). Congress made this delegation even more explicit in 1976, in Section 501(b) of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2685. These amendments expressly required the Secretary to "publish criteria to be employed to determine disability (as defined in [42 U.S.C.1382c(a)(3)(A)] of the Social Security Act) in the case of persons who have not attained the age of 18."[3]

[3] The Senate Finance Committee, which added this provision to the Act, stated that it was designed to "end the present uncertainty which the State agencies and others have with regard to what constitutes disability for children." S. Rep. No. 1265, 94th Cong., 2d Sess. 25 (1976). Senate Finance Committee Chairman Bentsen explained:

> The current situation is that the only definition of disability applied for purposes of SSI eligibility relates to employability * * * a concept obviously irrelevant to children. * * * Section 501 requires [the Secretary] to issue a definition of disability as it relates to children.

122 Cong. Rec. 33,301 (1976).

b. Where Congress expressly delegates to an agency the authority to interpret and implement a specific provision of a statute, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). "If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart Corp.* v. *Cartier, Inc.*, No. 86-495 (May 31, 1988), slip op. 8. See also *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981).

The Secretary—recognizing that children ordinarily do not work and therefore, unlike adults, cannot have their disabling impairments evaluated under an ability-to-work standard—has attempted to meet the "comparable severity" requirement by issuing, in addition to the adult list, a special list of disabling impairments that concentrates on childhood afflictions. This is a reasonable approach that satisfies both the language and intent of the statute. Congress did not direct that the criteria for determining disability of adults and children be identical, only that they be "comparable." As the term is commonly used, "comparable" does not require complete similarity, but only "enough similar characteristics or qualities to make comparison appropriate." See *Dawson* v. *Myers*, 622 F.2d 1304, 1311 (9th Cir. 1980).

As the Eleventh Circuit noted in *Powell*, 688 F.2d at 1360, the regulations provide for an identical standard as to three salient points: the "duration" requirement, the listings in Part A, and medical equivalence to the listings. Of the five-part test used for adults (20 C.F.R. 416.920), the Secretary's children's standard omits only the last two: ability to do past work and ability to perform substantial gainful employment in the future. Since these work-related factors cannot sensibly be applied to children, it was entirely reasonable for the Secretary to conclude that the "residual functional capacity" assessment used in applying these factors was inappropriate for children.

The Secretary took into account a child's functional limitations in a different way, by promulgating a separate set of listings in Part B applicable only to children. These listings reflect the Secretary's analysis of the functional limitations of children's impairments, as well as the Secretary's analysis of what impairments are "comparable" to those of adults. In promulgating the regulations, the Secretary stated: "Those impairments which were determined to impact on the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of 'comparable severity' to the adult listing." 42 Fed. Reg. 14,705 (1977). The Secretary went on to note that "[t]he medical criteria proposed * * * do result in functional limitations or restrictions, depending on the nature of the impairments, and these have been considered." *Id.* at 14,706.

The Secretary provided for an individualized assessment of each child by allowing children to qualify for benefits by showing the medical equivalent of any of the Part B listings. See *Hinckley*, 742 F.2d at 23. Furthermore, some of the Secretary's listings in Part B specifically call for a general assessment of a child's functional capacity. See,

e.g., 101.03C ("[i]nability to perform age-related personal self-care activities involving feeding, dressing, and personal hygiene"); 111.06 ("Persistent disorganization or deficit of motor function * * * which * * * interferes with age-appropriate major daily activities * * *"); 112.03 (psychosis resulting in "marked restriction in the performance of daily age-appropriate activities * * * [and] deficiency of age-appropriate self care skills"). Thus, claimants are given an opportunity to establish a functional limitation within the framework of a listed impairment or its medical equivalent.

c. The court of appeals assumed that the Secretary's listing of impairments was incomplete because the regulations governing adults "provid[e] for individualized assessment of the *actual* degree of functional impairment of adults whose medical findings do not entitle them to a *presumption* of disability by meeting or equaling the listings."App., *infra*, 12a (emphasis in original). But just because the adult's listings are not exhaustive, it does not follow that the child's listings are themselves incomplete so as to violate the statutory directive to identify children's disabilities of "comparable severity" to those that would entitle an adult to benefits. As noted, the Secretary has supplied a special listing of a child's disabilities that takes into account the child's functional capacity. A child may establish his eligibility either by showing that he has one of these disabilities or its medical equivalent. This scheme is sufficiently broad and flexible to satisfy the statute, and the court of appeals erred in substituting its own interpretation of the statutory language for that of the Secretary.

The court of appeals would require (App., *infra*, 17a) the Secretary to make "individual evaluations comparable to the residual functional capacity assessment for adults."

Yet the court of appeals offered no suggestion as to how this was to be done. A case-by-case evaluation of whether a child, *if* he were an adult, would be disabled is wholly unworkable. Adults are evaluated on the basis of their age, education and work experience. Yet in making an individualized assessment of whether a child, if he were an adult, could engage in substantial gainful work, how old, how educated, and how experienced should the "hypothetical" adult be? The court of appeals offered no guidance as to how the residual functional capacity assessment for adults translates to the different circumstances of childhood. More fundamentally, the court of appeals offered no justification for substituting its broader standard for the standard promulgated by the Secretary, which itself is plainly a "permissible construction" of the Social Security Act. *Chevron*, 467 U.S. at 843.

The Secretary's interpretation of the statute fully accords with the different purposes behind the disability programs for adults and children. The purpose of disability benefits for adults is to ensure "the basic means of replacing earnings that have been lost as a result of * * * disability" for those who "are not able to support themselves through work * * *." H.R. Rep. No. 231, *supra*, at 146-147. As this Court has noted, "[t]he Social Security Act defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace." *Heckler* v. *Campbell*, 461 U.S. 458, 459-460 (1983) (interpreting identical definition of disability in 42 U.S.C. 423). In light of this purpose, it is wholly appropriate for adults to be evaluated upon consideration of their functional capacity to perform work.

By contrast, Congress had a different set of considerations in mind in providing for children's SSI benefits. Recognizing that disabled children from low-income households are "among the most disadvantaged of all Americans," Congress thought that special disability

benefits would be appropriate for such children "because their needs are often greater than those of nondisabled children." H.R. Rep. No. 231, *supra*, at 147-148. Thus, the aim of Congress in establishing children's disability was not to replace lost income, but to provide for the special health care needs of disabled children, such as home health care expenses arising out of a child's medical impairment. It is entirely consistent with this purpose to focus consideration on the severity of the child's medical impairment, without consideration of vocational factors that could be applied only speculatively to a child too young to work in any event.[4]

2. As the court of appeals expressly acknowledged (App., *infra*, 16a), its decision "places [it] in a minority among courts which have considered the legality of these regulations." In *Powell* v. *Schweiker*, *supra*, a divided panel of the Eleventh Circuit rejected a challenge identical to the one in the case at bar. The court held (688 F.2d 1360) that the standards for children, while different, are not more restrictive than the adult standards and are in fact "comparable" to those for adults in the ordinary meaning of that term. Not only are the standards identical as to three salient points—the listings in Part A, the medical equivalence rule, and the duration requirement—but the standards for children also provide an additional set of listings applicable only to children, some of which take into account the child's functional ability. *Id.* The court accordingly concluded (*id.* at 1361) that the Secretary's regulations constitute a "reasonable interpretation" of the statute that is entitled to deference.

---

[4] Despite extensive and comprehensive Congressional oversight of the SSI program and the standards for determining disability, see, *e.g.*, *Schweiker* v. *Chilicky*, No. 86-1781 (June 24, 1988), slip op. 12-13, Congress has never questioned or altered the child's regulatory standard in the more than ten years since its promulgation.

In *Hinckley*, the First Circuit also held (742 F.2d at 23) that "the Secretary's regulations [regarding children's disability] constitute a reasonable interpretation and application of the statutory definition of 'disability'." The court in that case noted (*id.* at 22) that Congress had clearly recognized that vocational factors used to determine an adult's ability to engage in "substantial gainful employment" are inappropriate for children. The court acknowledged that the statute still requires the Secretary to take into account "not only the nature of the impairment, but also its particular effect on the functional capacity of children" (*id.* at 23). The court concluded (*ibid.*), however, that the Secretary's current regulations satisfy this standard. The regulations not only provide an additional list of impairments designed specifically for children, but also allow for "an assessment of a child's mental or physical limitations on an individual basis" by permitting the child to show the medical equivalent of a listed impairment. *Ibid.* The court also pointed out (*id.* at 23 n.2) that "[s]everal of the impairments in Part B are themselves evaluated in terms of the child's functional capacity." Finally, the Court noted (*id.* at 23) that the plaintiffs were themselves unable to provide an alternative standard for weighing a child's age, education, and functional capacity. Under these circumstances, the court found no basis for "strik[ing] down the reasonable standard promulgated by the Secretary * * *." *Ibid.*[5]

[5] The Fifth and Tenth Circuits have also upheld the regulations at issue here, though against less specific attacks. See *Petreleoni* v. *Secretary of HHS*, No. 87-2021 (10th Cir. Oct. 26, 1988); *Burnside* v. *Bowen*, 845 F.2d 587, 590-591 (5th Cir. 1988). The validity of the child's disability regulations is currently under consideration in the Ninth Circuit. *Burt* v. *Bowen*, No. 88-3990. There are district court cases going both ways on the issue (see App., *infra*, 16a-17a nn.4, 5).

The court of appeals in this case expressly rejected both *Powell* and *Hinckley*, finding neither decision "persuasive" (App., *infra*, 12a). The court below, however, did not simply create a split in the circuits. By virtue of the district court's certification of what appears to be a nationwide class of children's disability claimants,[6] the court of appeals has apparently overridden the prior contrary decisions of the First and Eleventh Circuits. The court has also preempted the further development of the law in other circuits on this issue. Under these circumstances, review by this Court is plainly warranted.

3. The issue in this case is of considerable practical importance. Because a nationwide class was certified, the court of appeals' ruling would require reevaluation of a substantial number of cases. This suit was filed in 1983. The Department of Health and Human Services estimates that over a quarter of a million cases have applied the existing regulations to deny children's benefits between 1983 and 1988. Even aside from any additional benefits that may have to be paid when a new standard is applied to these cases, HHS estimates that the mere readjudication of these cases would cost over $41 million.[7]

[6] The Secretary has asked the district court to clarify the scope of the certified class and to exclude from its scope those jurisdictions in which the issue has already been decided or is currently pending. The district court has not yet ruled on this motion.

[7] Plaintiffs have also asked the district court, as part of its summary judgment order, to toll the 60-day statute of limitations period contained in 42 U.S.C. 405(g), to include within the class persons who have failed to exhaust their administrative remedies, and to extend the starting date for the class back to July 29, 1975, when the Secretary's regulations relying on the Listing of Impairments to adjudicate children's claims was first published. See 40 Fed. Reg. 31,778, 31,783. Alternatively, plaintiffs have argued that the class should be extended

Finally, the development of an entirely new standard "comparable" to the vocational factors used for adults would itself entail a substantial administrative endeavor. The court of appeals' ruling (App., *infra*, 20a) that the Secretary must give children "an opportunity for individualized assessment of [the severity] of their functional limitations" does not explain how this is to be done. Thus, the Secretary presumably would need to convene a panel of experts from the health care profession to aid in formulating a new standard and develop procedures and training programs to implement the new standard. If such a standard requires the use of child guidance experts similar to the vocational experts used in adult cases, implementation could be even more costly and time consuming.

---

back to March 16, 1977, the date the Part B children's listings were published. See 42 Fed. Reg. 14,705. The Secretary has opposed these requests, but the district court has yet to rule on them. Obviously, if the district court extends the size of the class in any of these ways, the practical consequences of the court of appeals' ruling would be proportionally increased.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
JOHN F. CORDES
MATTHEW M. COLLETTE
Attorneys

FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1692
(D.C. Civil No. 83-3314)

ZEBLEY, BRIAN, BY HIS PARENT AND NATURAL GUARDIAN, ZEBLEY, JOHN, ON BEHALF OF HIMSELF AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED

INTERVENOR: RAUSHI, EVELYN, BY HER PARENT AND NATURAL GUARDIAN, RAUSHI, MARY

INTERVENOR: LOVE, JOSEPH, JR., BY HIS PARENT AND NATURAL GUARDIAN, MARGARITE LOVE, APPELLANTS

vs.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES

Appeal from the United States District Court for the Eastern District of Pennsylvania

---

(Filed Aug. 10, 1988)

OPINION OF THE COURT

Before: GIBBONS, Chief Judge, and MANSMANN and COWEN, Circuit Judges.

MANSMANN, *Circuit Judge*:

This appeal requires us to examine the policies and procedures used by the Secretary of Health and Human Services in determining whether a child is "disabled," so as to be eligible for Supplemental Security benefits. A child is

defined by statute to be disabled by "*any* medically determinable physical or mental impairment of *comparable severity*" to one which would enable an adult to qualify for disability benefits. 42 U.S.C. § 1382c(a)(3)(A) (emphasis added). The Secretary's regulatory scheme confines eligibility for benefits to children who can demonstrate an impairment with medical findings that meet or equal those of one of the specific impairments listed in an Appendix to the regulations. 20 C.F.R. § 416.924.

The Appendix has not been shown to provide an exhaustive catalog of medical findings which could, singly or in combination, describe, "any" impairment which might satisfy the statutory standard of "comparable severity." Therefore, we hold that the Secretary's regulatory scheme is too restrictive to be consistent with the statute. The statutory standard requires that children, like adults, be given an opportunity for individualized assessment of the severity of their functional limitations.

Accordingly, we will vacate the order of the district court with respect to the claim of the plaintiff class that the procedure set forth in 20 C.F.R. § 416.924 is inconsistent with the statutory mandate of 42 U.S.C. § 1382c (a)(3)(A), and we will remand the case for the entry of summary judgment for the class with respect to that claim. We will, however, affirm the order of the district court with respect to the additional claim of the plaintiff class that the regulations are inconsistent with the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 1381 *et seq.*

I.

In 1974, to complement the existing contributory social insurance program, Congress established the Supplemental Security Income program to assist "individuals

who have attained age 65 or are blind or disabled." 42 U.S.C. § 1381. Although welfare benefits are available under a separate program for needy families with children, Congress included disabled children under the somewhat more generous Supplemental Security Income program in the "belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society." H.R. Rep. No. 231, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4989, 5133.

The precise statute provides that:

> An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (*or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity*).

42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

The Secretary has promulgated regulations setting forth the procedure to be followed in determining whether a claimant meets the statutory definition of disability. Under the regulations, an adult or a child who is not performing any substantial gainful activity, and who has an impairment which meets the duration requirement and has medical findings which meet or equal the findings associated with a listing of specific impairments set forth in Appendix 1 to the regulations, will be found disabled under the regulations without considering any evidence

except the medical findings. 28 C.F.R. § 416.920(d); § 416.924(b). Medical equivalence to a listed impairment must be based on medical findings. 20 C.F.R. § 416.926(b). The functional consequences of combined impairments, "irrespective of their nature, *cannot* justify a determination of equivalence with a listed impairment." Soc. Sec. Rul. 83-19 (emphasis in original).

Part A of the Appendix sets forth medical criteria for evaluating impairments in adults and, where appropriate, in children as well. 20 C.F.R. Chapter III, Part 404, Subpart P, Appendix I. Part B of the Appendix lists additional medical criteria applicable to children only. *Id.* Part B is to be used first in evaluating disability for a person under age 18. 20 C.F.R. § 416.925(b)(2).

If an adult's medical findings do not meet or equal the listings, the regulations provide for an individualized assessment of the *actual* degree of functional impairment. 20 C.F.R. § 416.920(e) & (f).[1]

No such individual assessment is provided for children in the Secretary's regulations. If a child's medical findings

[1] 20 C.F.R. § 416.920(e) & (f) provide:

(e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no long do this kind of work, we use a different rule (see § 416.962).

do not meet or equal the listings, the child may not be found to be disabled regardless of the severity of the actual impairment.[2]

II.

Brian Zebley was born July 13, 1978 and received Supplemental Security Income (SSI) disability benefits as a disabled child from September 12, 1980 until January 26, 1983. An Administrative Law Judge (ALJ) for the Social Security Administration, Department of Health and Human Services, determined later that the medical evidence of congenital brain damage with spastic right hemiparesis, mental retardation, development delay, eye problems and musculoskeletal impairments on the right side no longer met or equaled the requirements of any section of the Listing of Impairments at Appendix 1. Therefore, the Administration found that Brian's childhood disability ceased as of June, 1982 and that his eligibility for SSI terminated August 31, 1982. The Appeals Council denied review and, on July 1, 1983, Zebley filed a class action complaint against the Secretary in the district court.

Zebley asserted as an individual that the decision to terminate his benefits was not supported by substantial

[2] 20 C.F.R. § 416.924 (1980) provides:

How we determine disability for a child under age 18.

We will find that a child under age 18 is disabled if he or she—

(a) Is not doing any substantial gainful activity; and

(b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)

(1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or

(3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of Part 404 of this chapter.

evidence. On behalf of the class, he asserted that the Secretary's policy and regulations violated the Social Security Act, specifically 42 U.S.C. § 1382(a)(3)(A), by the Secretary refusing to consider all pertinent facts and medical and vocational factors in determining children's eligibility for SSI disability payments.

Joseph Love, Jr., whose claim for SSI benefits was denied, and Evelyn Raushi, whose benefits were terminated, filed petitions to intervene on September 2, 1983 and November 1, 1983 respectively. On January 10, 1984, the district judge certified a class of

> "[a]ll persons who are now, or who in the future will be, entitled to an administrative determination (whether initially, on reconsideration, or on reopening) as to whether supplemental security income benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed."

On October 12, 1984, the district court granted Zebley's motion for partial summary judgment. The court reversed the Secretary's decision on Zebley's individual claim and remanded it to the Secretary for calculation and award of benefits.

On March 13, 1985, upon the Secretary's uncontested motion, the district court remanded Evelyn Raushi's claim to the Secretary for review in accordance with the Social Security Benefits Reform Act of 1984, 42 U.S.C. § 1381 *et seq.* (Supp. 1987).

On July 16, 1986, the district court granted the Secretary's motion for partial summary judgment and dismissed the claims of the plaintiff class challenging the Secretary's regulations.

On April 23, 1987, pursuant to the parties' stipulation, the claim of intervenor Joseph Love was remanded to the

Secretary for review under the Social Security Benefits Reform Act of 1984.

On October 26, 1987, the district court certified the entry of final judgment in accordance with Fed. R. Civ. P. 54(b). On November 5, 1987, plaintiffs, intervenors and all members of the certified class appealed. Numerous amici curiae filed briefs in support of the appellants.[3]

III.

The plaintiffs challenge only the dismissal of the certified class' claim that the Secretary's regulatory scheme for determining disability in children is inadequate to identify "*any* medically determinable physical or mental impairment of *comparable severity*" to one which would disable an adult as required by 42 U.S.C. § 1382(a)(3)(A) (emphasis added). The plaintiffs argue that the regulatory scheme violates the statutory standard by restricting eligibility for benefits to children who can demonstrate an impairment with medical findings that meet or equal those

---

[3] Briefs in support of the plaintiff class were filed by the following amici curiae:

American Academy of Child and Adolescent Psychiatry, American Psychiatric Association, Association for Retarded Citizens of the United States, Center for Law and Social Policy, National Alliance for the Mentally Ill, National Association of Private Residential Resources, National Association of Protection and Advocacy Systems, National Mental Health Association, Pennsylvania Protection and Advocacy, Inc., Pennsylvania Tourette Syndrome Association, Sickle Cell Genetic Disease Council, Spina Bifida Coalition of Pennsylvania, Pennsylvania Association for Retarded Citizens, United Cerebral Palsy of Pennsylvania, Eastern Pennsylvania Chapter of the Arthritis Foundation, Parent Education Network, Chester County Right to Education Task Force, Media Child Guidance Community Mental Health/Mental Retardation Services, Inc., Mental Health Association in Indiana County, Inc., Spina Bifida Association of the Delaware Valley, Inc., The Spina Bifida Association of Greater Los Angeles, Welfare Recipients League, and Russell Champaign.

of one of the specific impairments listed in Appendix 1 to the regulations. The plaintiffs assert that the statutory standard requires the same individualized assessment of the severity of a child's functional limitations as is available for adults who are not able to establish their disability on the basis of medical evidence alone.

Between the filing of the complaint and the entry of the final order in this case, Congress passed the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 1381 *et seq*. The plaintiffs assert that the regulatory scheme violates the Reform Act, which requires the Secretary to consider the medical severity of a combination of impairments without regard to whether any individual impairment, if considered separately, would be of sufficient medical severity to be the basis of eligibility for benefits. 42 U.S.C. § 1382(a)(3)(G) and (H) (Supp. 1987).

The plaintiffs also argue that the Secretary has ignored section 5(a) of the Reform Act which, plaintiffs assert, directs the Secretary to revise the "Mental and Emotional Disorders" listings for children.

The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(C)(3). We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

IV.

The question on our review of district court decisions in suits challenging Social Security regulations is whether the district court applied the correct legal precepts in reaching its conclusions. *Barnes* v. *Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985). Our review of the district court's interpretation and application of legal precepts is plenary. *Gaines* v. *Amalgamated Ins. Fund*, 753 F.2d 288, 290 (3d Cir. 1985).

A reviewing court must defer to an agency's interpretation of a statute which the agency administers so long as the interpretation is reasonable. *Lugo* v. *Schweiker*, 776 F.2d 1143, 1147 (3d Cir. 1985). Section 1383(d)(1) of the SSI statute grants the Secretary "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions. . . ." Because Congress did not describe explicitly a *method* for determining whether a claimant is disabled, our review is limited to determining if the regulation in question, 20 C.F.R. § 416.924, exceeds the Secretary's authority or is arbitrary or capricious. *Bowen* v. *Yuckert*, __ U.S. __, 107 S.Ct. 2287 (1987); *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983).

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congessional intent. *Lugo* v. *Schweiker*, 776 F.2d at 1147. The agency's regulations must give effect to the unambiguously expressed intent of Congress. *Id.*

A.

The plaintiffs and amici curiae argue that the Secretary's child disability evaluation policy is inconsistent with the statute because it fails to afford an individualized assessment of the actual extent of functional impairment resulting from a child's medical pathology. They assert that the regulatory procedure fails to identify many children who are disabled as defined by the statute and the regulations. The following assertions by the Spina Bifida Association of Greater Los Angeles are illustrative of the numerous examples alleged by amici to demonstrate the

inadequacy of the Secretary's exclusive reliance on the medical listings.

> Many of the disability problems children with spina bifida have, and which result in functional limitations, are not catalogued in the children's listings of impairments: gastrostomy tubes into the stomach through which a child is fed; tracheostomies which are openings into the neck through which the child breathes and through which the child is suctioned to prevent aspiration or pneumonia; and shunts to remove excess fluid from the head to prevent or minimize brain damage from the pressure of water on the brain. As a result of having functional limitations due to disability problems not catalogued in the Listings, some severely disabled spina bifida children have not been able to qualify for Supplemental Security Income (SSI).

Brief of Amici Curiae at p. 2.

In interpreting a statute, our starting point is the language itself; it is to be presumed that the legislative purpose is expressed by the ordinary meaning of the words used, and if the statutory language is clear, it is not necessary to examine legislative history. *Barnes* v. *Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

The statute provides that:

> An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (*or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity*).

42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

In keeping with the statute, the regulations provide that a child will be found disabled if "suffering from any medically determinable physical or mental impairment which compares in severity to an impairment that would make an adult (a person over age 18) disabled." 20 C.F.R. § 416.906. The Secretary adopted listings for children which were determined to be of "comparable severity" to the adult criteria. *Id.* According to the regulations, the listed impairments "are considered severe enough to prevent a person from doing any gainful activity." 20 C.F.R. § 416.925. Thus, the functional consequence of the listed impairments is presumed.

When a court reviews an agency's construction of a statute which it administers, the court is confronted with two questions: whether Congress has directly spoken on the precise question at issue; if the statute is silent or ambiguous with respect to the specific issue the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227; *Kean* v. *Heckler*, 799 F.2d 895 (3d Cir. 1986).

Congress has expressed unambiguously its intent that "any" impairment which meets the statutory standard shall be found disabling. Therefore, the Secretary's regulatory method for determining disability must be adequate to identify *any* qualifying impairment.

The listings, however, do not purport to be an exhaustive compilation of medical conditions which could impair functioning to the extent necessary to satisfy the statutory standard for liability. The regulations recognize

this by providing for individualized assessment of the *actual* degree of functional impairment of adults whose medical findings do not entitle them to a *presumption* of disability by meeting or equaling the listings. 20 C.F.R. § 416.920(e) and (f).

As we explained above, the regulations do not provide for such individual assessment for children, although they are entitled by statute to receive benefits if suffering from "any" impairment of "comparable severity" to one which would render an adult unable to engage in "substantial" gainful activity. It is the expressed intention of Congress that children be given the opportunity to show that they suffer from "any" impairment of "comparable severity" to one which would actually, even if not presumptively, disable an adult.

Therefore we find that the regulations are inconsistent with the statute in precluding a finding that a child is disabled unless his impairment meets or equals a listed one.

The district court rejected the challenge to the validity of the regulations relying principally on the precedential force of two appellate court decisions, *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982), *reh'g denied*, 694 F.2d 727 and *Hinckley* v. *Secretary of HHS*, 742 F.2d 19 (1st Cir. 1984). The Secretary's arguments on this appeal are essentially those adopted by the courts in *Powell* and *Hinckley*. We find neither decision persuasive.

The Court of Appeals for the Eleventh Circuit in *Powell* considered the argument that the Secretary's regulations were inadequate in failing to provide criteria for children, comparable to vocational factors for adults, against which to compare the medical evidence in determining the actual degree of a child's functional impairment. The court, however, concluded that the regulations were "reasonably

related to the purposes of the legislation" because some impairments of "comparable severity" would be identified by certain of the listings in Part B which evaluate the degree of medical impairment in terms of a child's ability to perform age-appropriate activities. 688 F.2d at 1360. We decline to accept this reasoning.

We reiterate that Congress has unambiguously expressed its intent that "any" impairment which meets the statutory standard shall be found disabling. The Secretary's regulatory method for determining disability, which is adequate to identify only *some* comparable impairments is not enough.

Similarly, the Court of Appeals for the First Circuit concluded in *Hinckley* that the regulation "allows for an assessment of a child's mental or physical limitations on an individual basis by providing that a child may be found disabled if his impairment 'is determined by [the Secretary] to be medically equal to an impairment listed in [the Appendix].' " 742 F.2d at 23. We also decline to accept this conclusion.

Medical equivalence to a listed impairment must be based on medical findings. 20 C.F.R. § 416.926(b). In the final analysis, it is functional impairment which is meant to be evidenced by the medical findings. It is *only* impaired ability to function which results in disability. Nevertheless, the Secretary has made it clear that the functional consequences of combined impairments, "irrespective of their nature, *cannot* justify a determination of equivalence with a listed impairment." Soc. Sec. Rul. 83-19 (emphasis in original). Therefore, something more is necessary in order to determine whether the degree of a claimant's impairment satisfies the statutory standard for disability.

The Secretary argues vigorously that the Staff of the Senate Committee on Finance reporting publication of the

regulations, approves the regulations as consistent with the statute, an argument which was adopted by the *Hinckley* court. 742 F.2d at 22. The report noted that "[t]he nonmedical *vocational* factors were not applied to the children for basically the same reasons they had not been applied to disabled widows in earlier legislation, *i.e.*, that as a group they had not had enough attachment to the labor force to make application of these factors feasible." Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., The Supplemental Security Income Program 125 (Comm. Print 1977). We disagree that children's and widows' similar lack of attachment to the labor force justifies the Secretary's limited procedures with respect to children.

At the time Congress amended the Social Security Act to provide for widows' benefits, the existing test for disability was the one which was later adopted for SSI benefits, *i.e.*, the ability to engage in "substantial gainful activity." In providing for widows' benefits, Congress explicitly authorized a more stringent disability standard. The statute provides as follows:

> A widow, surviving divorced wife, or widower shall not be determined to be under a disability . . . unless his or her physical or mental impairment or impairments are of a level of severity which *under regulations prescribed by the Secretary* is deemed to be sufficient to preclude an individual from engaging in *any* gainful activity.

The legislative history shows that Congress was well aware of the difference. The House version of the bill offered inability to engage in "any" gainful activity as the standard. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Admin. News 2834, 3197. The Senate version was more liberal, using the

"substantial" gainful activity standard. *Id.* The conference agreement settled on the language from the House bill. *Id.*

In enacting the SSI plan, Congress explicitly provided that adult eligibility is to be measured by inability to engage in "substantial" gainful activity, and that children's disability is to be evidenced by "any" impairment of "comparable severity." 42 U.S.C. § 423(d)(2)(B) (emphasis added). Significantly, the statute did *not* provide that children's impairments need be comparable to those which would disable an adult from *any* gainful activity.

The finance committee report cited by the Secretary postdated the passage of the statute by approximately five years, and post-enactment comment by a legislative committee generally does not serve as a reliable indicator of congressional intent. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979). Even if the report can be said to evidence Congress' implicit approval of ignoring *vocational* factors in gauging disability in children, this does not mean that the Secretary is not required to assess a child's functional impairment against appropriate criteria *comparable* to vocational factors for adults.

The court in *Hinckley* expressed its concern that in requiring the Secretary to measure the actual degree of functional impairment caused by each child's medical condition(s), the court would also have to devise a standard against which to assess when a child's remaining capabilities are comparable to an adult's inability to engage in "substantial gainful activity." 742 F.2d at 23. We see no necessity for such an intrusion upon the Secretary's authority.

The Secretary has already interpreted the statutory standard of "comparable severity" to comprehend those impairments which impact on a child's "development" to the same extent that a disabling impairment impacts on an

adult's ability to engage in substantial gainful activity. 42 Fed. Reg. 14705 (1977).

We recognize that our decision places us in the minority among courts which have considered the legality of these regulations.[4] Nevertheless, our review of authorities upholding the regulations[5] does not persuade us to abandon our conclusion that the Secretary's prescribed method for determining disability in children is too restrictive to be consistent with the statute.

---

[4] The following cases support the position of the plaintiff class: *See* Mental Health Assoc. of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), *aff'd* 720 F.2d 965 (8th Cir. 1983) (Sec'y may not presume that mentally impaired claimants are not disabled unless they meet the listings); Burt v. Bowen, No. C-85-1033-JBH, (E.D. Wash. May 12, 1988) (Secretary does not possess statutory authority to limit children's disability to less than any impairment of comparable severity to one which would support an award to an adult after step 3 in the sequential process); Gordon v. Secretary of HEW, No. CV 75-4088-F(G) (C.D. Calif. May 6, 1977) (remand because of exclusive application of listed impairment test – Secretary failed to consider whether child might be disabled under language in regulations to effect that medical equivalence determination must give "appropriate consideration of the particular effect of disease processes in childhood" 20 C.F.R. § 416.904, which is intended to extend to children the same individualized determination of disability as is available to adults). *See also, Bowen v. City of New York*, 476 U.S. 467 (1986) (SSA rules for determining disability based on mental impairment are illegal in confining mental disability determinations to the narrow "listings").

[5] The following authorities arguably support the Secretary's position: Burnside v. Bowen, 845 F.2d 587 (5th Cir. 1988) (minor claimant with cystic fibrosis was evaluated under proper legal standards); Hinckley v. Secretary of H.H.S., 742 F.2d 19 (1st Cir. 1984) (Secretary's guidelines for determining whether a child under 18 is disabled are valid); Powell v. Schweiker, 688 F.2d 1357, (11th Cir. 1982), *reh'g denied*, 694 F.2d 727 (failure to carry over adult evaluation scheme for children's disabilities was not inconsistent with the statutory definition of disability); Wills v. Secretary, No. M87-72 CA, 1987 WL 46333 (W.D. Mich., Dec. 14, 1987). (The Secretary has permissibly construed the "comparable severity" language of the statute); Blankenship v. Schweiker, No. 79-3134 (S.D. W.Va. June 19, 1981) ("comparable severity" doesn't mean that vocational factors test must be applied in determining children's disability because statute specifically excludes children from discussion of work activity standard); Zukow v. Harris, No. 80-3199 (M.D. Tenn. December 15, 1980). (Secretary need not consider whether child of [*sic*] disability claimant's impairments prevent her from engaging in substantial gainful activity because statute and legislative history exclude children when discussing work activity, and typical child has not [*sic*] expectation of income but for the existence of an impairment).

A reviewing court must reject administrative constructions of a statute, whether reached by adjudication or by rule making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. *Securities Industry Ass'n v. Board of Governors of Federal Reserve System*, 468 U.S. 137 (1984). We are persuaded that in the statutory directive that "any" impairment may be disabling if severe enough, Congress has clearly expressed an intention that children be given the opportunity for individual evaluations comparable to the residual functional capacity assessment for adults. This intent is contrary to that of the agency, which is to restrict children to listed impairments.

Therefore we will vacate the district court's order of summary judgment for the Secretary and remand with the direction to enter summary judgment in favor of the plaintiff class as to this claim.

B.

The plaintiffs' second argument is that the regulations are inconsistent with the 1984 Reform Act with respect to children because the regulations do not require consideration of the "combined effect of all impairments" and "all evidence available."

This claim need not detain us long because its resolution follows from our disposition of the previous issue. The 1984 Disability Reform Act does require that the Secretary shall consider the combined impact of multiple impairments throughout the disability determination process, 42 U.S.C. § 1382c(a)(3)(G) (Supp. 1987), and that the Secretary shall consider all evidence available, 42 U.S.C. S1382c(a)(3)(H) (Supp. 1987).

The regulations recognize those mandates by providing expressly that multiple impairments will be considered in assessing medical equivalence, 20 C.F.R. § 416.926, and by providing generally that the combined effect of all of a claimant's impairments will be considered throughout the disability determination process. 20 C.F.R. § 416.923. As we held earlier, an individualized determination of the degree of functional incapacitation is required by statute during the disability determination process for children. Existing regulations will serve to assure consideration of multiple impairments during that additional evaluative step.

C.

The Plaintiffs' final contention is that the Secretary has violated Section 5(a) of the 1984 Reform Act by failing to revise the mental disorder listings for children. The Secretary contends that the Reform Act directed the Secretary to revise only the listings of mental impairments for adults and not those for children. The mandate of the Reform Act reads as follows:

> The Secretary of Health and Human Services (hereafter in this Section referred to as the "Secretary") shall revise the criteria embodied under the category "*Mental Disorders*" in the "Listing of Impairments" in effect on the date of the enactment of this Act [Oct. 9, 1984] under the Appendix 1 of Subpart P of Part 404 of Title 20 of Code of Federal Regulations. The revised criteria and listings, alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be *designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment.* Regulations establishing such revised criteria and listings shall be published no later than 120 days after the date of the enactment of this act [Oct. 9, 1984].

42 U.S.C. § 421 note (Supp. 1987) (emphasis added).

In August, 1985, the Secretary issued new listings under the category "Mental Disorders" in Appendix 1, Part A, which are applicable to adults and children. The Secretary did not revise the listings under the category "Mental and Emotional Disorders" in Appendix 1, Part B, which are applicable to children only. Since the statutory time limit for revising the listings has expired, the plaintiffs request the equitable remedy of a court-ordered timetable for revision of the children's listings.

The Secretary argues that Congress mandated revision only of the category expressly designated by the statute. The precise designation "Mental Disorders" appears only in Part A of Appendix 1 of the regulations. The comparable category in Part B is entitled "Mental and Emotional Disorders." Therefore, argues the Secretary, Congress intended only that the Part A listings be revised.

In addition, the Secretary points to Congress' expressed purpose that the revision result in criteria and listings "designed to realistically evaluate the ability of a mentally impaired individual to engage in a competitive workplace environment." The argument proceeds that since children, for the most part, have no connection with the workplace,

Congress' manifest purpose is to achieve revision of only the adult criteria.

An agency's interpretation of a statute which it administers is entitled to deference, and need not be the only reasonable one in order to gain judicial approval. *Lugo v. Schweiker,* 776 F.2d 1143, 1147 (3d Cir. 1985). Plaintiffs and amici urge that the children's listings are based on outmoded medical and scientific concepts of disability assessment. They are unable, however, to point to any unambiguous evidence of congressional intent which would compel us to find the Secretary's interpretation of the Reform Act to be "arbitrary and capricious." *Id.* Neither the legislative history nor the statutory language itself makes any reference to whether Congress intended that the children's listings in Part B be included in the mandated revision. If a statute is silent or ambiguous with respect to the specific issue, and the agency's construction is reasonable, a court must defer to that construction, although it may not be the only or even the most reasonable one. *Kean v. Heckler,* 799 F.2d 895 (3d Cir. 1986). Accordingly, we will defer to the Secretary's interpretation of the statute.

VI.

In accordance with the foregoing, we will vacate in part the order of summary judgment in favor of the Secretary and remand to the district court with the direction that summary judgment be entered in favor of the plaintiff class as to the claim that the Secretary is required by statute to give child claimants for SSI benefits an opportunity for individualized assessment of their functional limitations.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 83-3314

JOHN ZEBLEY, ET AL.

v.

MARGARET M. HECKLER (BOWEN), SECRETARY OF HEALTH AND HUMAN SERVICES

July 16, 1986

MEMORANDUM AND ORDER

FULLAM, Chief Judge.

Persons in certain economic categories are entitled to supplemental security income ("SSI") under the Social Security Act if they are disabled. The statute defines disability as follows:

> "An individual shall be considered to be disabled for purposes of this title if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment *of*

comparable severity). . . ." 42 U.S.C. § 1382c(a)(3)(A). (Emphasis added.)

Plaintiffs in this class action challenge the regulation which has been adopted by the Secretary for determining whether a child is disabled within this definition, 20 C.F.R. § 416.923, which provides:

> "How we determine disability for a child under age 18.
>
> We will find that a child under age 18 is disabled if he or she—
>
> (a) is not doing any substantial gainful activity; and
>
> (b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)—
>
> (1) Meets the duration requirement; and
>
> (2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or
>
> (3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of Part 404 of this chapter.

It is common ground that, in evaluating an adult's disability, a five-step sequential analysis is used: (1) Is the claimant gainfully employed? (2) Is the claimed impairment sufficiently severe to significantly limit the claimant's physical or mental ability to do basic work? (3) Does the impairment meet the duration requirement, and is it listed in Appendix 1 or equal to a listed impairment? [if so, the analysis stops at this point, and benefits are awarded] (4) Does the claimant have sufficient residual functional capacity to perform his previous work? And (5) if not, does the claimant have residual functional capacity, considering his age, education and work experience, to engage in gainful employment? In the case of a child, however, only the first three steps in the analysis are followed (and the first step is virtually automatic).

The net result, according to plaintiffs, is that an adult claimant whose impairment is not of the prescribed severity or is not listed can nevertheless establish eligibility for benefits by showing that he lacks residual functional capacity for gainful employment. The contention is that Congress specified that children are eligible for SSI benefits if they suffer from a physical or mental impairment comparable to that which would prevent an adult from engaging in gainful employment, hence a child claimant should have the same opportunity to prove inability to function adequately in a child's environment as that which is provided the adult claimant under the "residual functional capacity" rubric.

Strikingly similar challenges to the regulation have been rejected by the only two appellate courts to consider the issue, *Powell v. Schweiker*, 688 F.2d 1357 (11th Cir. 1982) and *Hinkley v. Secretary of HHS*, 742 F.2d 19 (1st Cir. 1984). In both cases, it was held that the Secretary's regulations and directives for determining the disability of children are not inconsistent with the statute—although, admittedly, other approaches, including a child's equivalent of "residual functional capacity" would have been as good or better.

Attempting to escape the precedential force of the cited cases, plaintiffs argue that their challenge is not so much to the elimination of the fourth and fifth steps of the sequential analysis (*i.e.*, depriving the child-claimant of "vocational factors"/"residual functional capacity"), as to the differences between children and adults in the way in which the third step of the sequential analysis is applied. Acknowledging that children's mental and physical im-

pairments are different from those of adults, and have differing impacts—hence, that providing a listing applicable to both children and adults, and a separate, additional listing for children, is not inappropriate—plaintiffs nevertheless contend that, in many situations, the wooden and inflexible application of the prescribed standards for evaluating medical conditions, particularly combinations of conditions, results in a finding of "not disabled" in the case of a child, when an adult with less severe impairments would be found disabled.

Plaintiffs' argument may well be valid, in many cases; but errors in applying the regulations in some cases do not demonstrate invalidity of the regulations themselves. Part B of the Secretary's listings of impairments, 20 C.F.R. § 416.925, is not facially invalid or incomplete, seems to provide the necessary flexibility, and, in my view, permits the award of benefits in conformity with the intent of Congress. If these criteria are being misapplied or misinterpreted, the remedy lies in the appeal process in individual cases, not in a class-action decree.

I have concluded, therefore, that the claims of plaintiff class challenging the Secretary's regulations must be dismissed. The defendant's Motion for Summary Judgment will, to that extent, be granted, without prejudice to the claims of the named plaintiffs, intervenors and individual class members.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-1692

BRIAN ZEBLEY, ET AL.

vs.

OTIS BOWEN, M.D., ETC.,

[Filed Oct. 18, 1988]

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Seitz and Hutchinson would have granted rehearing in banc.

BY THE COURT,

/s/ CAROL LOS MANSMANN
Circuit Judge

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699:00096